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# In the Supreme Court of the United States

OCTOBER TERM, 1973

No. —

INTERSTATE COMMERCE COMMISSION, APPELLANT

*v.*

OREGON PACIFIC INDUSTRIES, INC.; ARTHUR A. POZZI CO.; TIMBERLAND LUMBER CO.; CHAPMAN LUMBER CO.; NORTH PACIFIC LUMBER CO.; AND AMERICAN INTERNATIONAL CO.

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON*

## JURISDICTIONAL STATEMENT

### OPINION BELOW

The opinion of the district court (App. A., *infra*, pp. 11–20) is reported at 365 F. Supp. 609. The Interstate Commerce Commission's Service Order No. 1134 (App. B., *infra*, pp. 21–24) is unreported.

### JURISDICTION

The opinion and judgment of the three-judge district court was entered on October 18, 1973. A Notice of Appeal was filed by the Interstate Commerce Commission on December 14, 1973 (App. C., *infra*, pp.

26–26). The jurisdiction of this Court is conferred by 28 U.S.C. § 1253. *City of Chicago v. United States,* 396 U.S. 196.

**QUESTION PRESENTED**

Whether the lower court erred in holding that the circumstance that certain carrier practices directly affecting car utilization are embodied in their tariffs and affect the charges paid by shippers thereby deprives the Interstate Commerce Commission of the power to issue a car service order under Section 1(15) of the Interstate Commerce Act, temporarily suspending that practice, as an emergency measure to alleviate a critical freight car shortage.

**STATUTE INVOLVED**

Section 1(15) of the Interstate Commerce Act, 49 U.S.C. § 1(15), provides:

> Whenever the Commission is of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleading by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine: (a) to suspend the operation of any or all rules, regulations, or practices then established with respect to car service for such time as may be determined by the Commission; (b) to make such just and reasonable directions with respect to car service without regard to the ownership as between carriers of locomotives, cars, and other vehicles, during such emergency as in its opinion will best promote the service in the interest of the public and the commerce of the people, upon such terms of compensation as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; (c) to require such joint or common use of terminals, including main-line track or tracks for a reasonable distance outside of such terminals, as in its opinion will best meet the emergency and serve the public interest, and upon such terms as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; and (d) to give directions for preference or priority in transportation, embargoes, or movement of traffic under permits, at such time and for such periods as it may determine, and to modify, change, suspend, or annul them. In time of war or threatened war the President may certify to the Commission that it is essential to the national defense and security that certain traffic shall have preference or priority in transportation, and the Commission shall, under the power herein conferred, direct that such preference or priority be afforded.



**STATEMENT**

The Nation is currently in the midst of the worst continuing boxcar shortage in its history. The problem has been particularly acute in the lumber industry,

where the general shortage has been exacerbated by the shippers' practice of using boxcars as mobile warehouses, moving their lumber to market via a process known as sales-in-transit in which boxcars are loaded with lumber and shipped to hold and reconsign points prior to being sold to the ultimate consumer. The existing tariffs permit reconsigning this transit lumber after arrival at hold points subject only to nominal reconsignment charges and demurrage for detention in excess of 24 hours after notice of arrival is given—charges which, the Commission's field reports revealed, were wholly inadequate to prevent excessive and growing delays in reconsignment.

Section 1(15) of the Interstate Commerce Act expressly authorizes the Commission "with or without notice, hearing, or the making or filing of a report" to issue car service directions "[w]henever the Commission is of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists." Concluding that the continuing practice of using boxcars as warehouses, coupled with the unprecedented strain put on the National boxcar fleet by the requirements of the Russian grain movement, constituted an "emergency" within the purview of the statute, the Commission issued its Service Order No. 1134, designed to alleviate the car shortage caused by excessive delay in reconsignment by limiting the hold time at reconsignment points to five days (120 hours), exclusive of Saturdays, Sundays, and holidays. If the shippers choose to hold their lumber cars at reconsignment points longer than five days, they would



be subject to local or joint tariff rates from the point of origin—to the hold point—to the ultimate destination.

On appeal, the district court held that the Commission "was without Congressional authority to issue the order under the provisions of § 1(15)" (App. A., *infra,* p. 18). Disregarding the clear and unambiguous statutory language which authorizes the Commission, without notice or hearing, to issue service orders "[w]henever [it] is of opinion that shortage of equipment * * * or other emergency requiring immediate action exists", and ignoring this Court's prior holding that the car service authority is applicable to "the use to which the vehicles of transportation are put * * *" *Peoria and Pekin Union Railway Co.* v. *United States,* 263 U.S. 528, 533, the lower court held that, because the effect of the order would be to compel shippers who choose to use the boxcars as mobile warehouses to pay a higher charge therefor, the order constituted a "rate fixing order developed through procedures lacking due process" (App. A., *infra,* p. 18).

### THE QUESTION IS SUBSTANTIAL

By its action the lower court has cast grave doubt on the Commission's most effective and necessary regulatory tool for directing efficient use of the Nation's scarce boxcar resources. It is well known that despite various regulatory efforts,[1] the Nation's present box-

[1] In an effort to ameliorate the effects of the boxcar shortage the Commission has moved on a number of related fronts, establishing a new schedule of payment for the use by one railroad of another's cars—"basic per diem", *Chicago, B. & Q. R. Co.* v.

car fleet is inadequate to meet today's needs. The Commission [2] and Congress [3] have long wrestled with the problem of car supply to little avail. The shortage remains, and correspondingly, the Commission's ability to direct effective use of the Nation's limited rail resources through service orders has become a matter of major, and increasing, importance.

The car service order under review was but one of an orchestrated series of orders [4] necessitated by an

*New York S. & W. R. Co.*, 332 I.C.C. 176, sustained on review *sub nom. Union Pacific R. Co.* v. *United States*, 300 F. Supp. 318 (D. Neb. 1969), and *Boston & Maine Railroad* v. *United States*, 297 F. Supp. 615 (D. Mass. 1969), *aff'd per curiam* 396 U.S. 29; adding an "incentive" element to the basic per diem to encourage the prompt return of equipment found to be in short supply, see *United States* v. *Florida East Coast Ry. Co.*, 410 U.S. 224, sustaining the procedures used by the Commission in promulgating the incentive per diem charges in *Incentive Per Diem Charges—1968*, 337 I.C.C. 183, 337 I.C.C. 217; and requiring that unloaded freight cars be returned with or without a load in the direction of the owning line, *Investigation of Adequacy of Freight Car Ownership*, 335 I.C.C. 264, 335 I.C.C. 874, sustained *sub nom. United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742.

[2] See, *e.g. Car Service, Freight Cars*, 268 I.C.C. 687 (1947); *Car Supply Investigation*, 42 I.C.C. 657 (1917); *Car Shortages—Insufficient Transportation Facilities*, 12 I.C.C. 561 (1907).

[3] Congress is similarly concerned with the problems of car supply. See, e.g., S. Rep. 386, 89th Cong., 1st Sess. (1965); S. Rep. 445, 87th Cong., 1st Sess. 720 (1961); S. Rep. 452, 86th Cong., 1st Sess. (1959).

More recently the Senate passed on July 23, 1973, Senate Bill S. 1149 which is intended to "Increase the Supply to Meet the Needs of Commerce, Users, Shippers, National Defense, and the Consuming Public". S. Rep. 93–303, 93rd Cong., 1st Sess.

[4] Contrary to the arguments made by the plaintiffs below to the effect that the lumber industry was unfairly singled out to bear the brunt of corrective measures embraced in car service



unusual combination of the underlying chronic boxcar shortage, a booming economy, the financial inability of a significant segment of the rail industry to add to the boxcar fleet, and the unexpected demands made on the Nation's overall transportation resources by the Russian grain sales. Against this background, the Commission viewed the practice of using boxcars as mobile warehouses for longer and longer periods as adding to the overall rail emergency. Service Order No. 1134, while not eliminating shippers' rights to reconsignment in transit, sought to limit the hold time at reconsignment points to five working days, and thereby increase the transportation usage of the affected boxcars.

In holding that, because the order necessarily had to suspend temporarily the underlying tariffs which al-

orders, a number of contemporaneous orders were issued affecting different segments of the economy in an attempt to meet the car shortage crisis.

For instance, the grain industry was subjected to Service Order No. 1120. There the Commission placed a restriction on the number of jumbo covered hopper cars that could be used in unit-grain-train service. This action was considered necessary to insure better distribution of cars among all grain shippers—large and small.

Similarly, by Service Order No. 1117, the Commission permitted the substitution of open-top hopper cars (normally used for coal movements) for the transportation of grain. In other words, it permitted the diversion of coal industry transportation resources to help move the Russian grain to the ports. And with the unprecedented volume of grain moving to the ports causing congestion and delays, the Commission by Service Order No. 1121 reduced the free-time period on boxcars and covered hoppers held at port from the existing five and seven-day period to three days. Other types of equipment were later added to the order.

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low the practice of indefinite holding at reconsignment points in order to accomplish its goal, the order thereby became a "rate order" rather than a "car service order", the lower court has imposed an unwarranted limitation upon the Commission's statutory authority. Section 1(15) expressly authorizes the Commission to "suspend the operation of any or all * * * practices then established with respect to car service * * *" in an emergency situation. On its face, this applies to those practices contained in a carrier's tariff, as well as any other practice. Moreover, in concluding that the Commission's order is a "rate order", the district court has wholly ignored the fact that under Service Order No. 1134, the shipper retains complete initiative and option as to what rate he will pay. As long as the shipper seeks only transportation and reasonable reconsignment services, there is no change whatsoever in the charge he must pay. Only when he seeks to use the boxcar, not for transportation but for warehousing, does the service order have any effect at all on his total bill.

This Court has emphasized that the car service authority applies to "the use to which the vehicles of transportation are put * * *" (*Peoria and Pekin Union Railway Co.* v. *United States, supra*)—precisely the point of the service order at issue. The entire purpose of the order was to discourage shippers from using the boxcars as warehouses, thereby freeing more cars for use in transporting goods. And, indeed, there certainly can be no doubt that this purpose was well within the contemplation of Section 1(15), since the



problem of mobile warehousing was one of the specific problems to which the Commission's car service authority was originally addressed.[8]

By holding that the temporary suspension of the underlying tariffs which embody practices in conflict with car service goals takes a Commission order outside the ambit of the car service provisions, the lower court has significantly weakened the Commission's power to direct car service in the public interest. No requirement in law compels such an illogical and technical result.

## CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted.

FRITZ R. KAHN,
*General Counsel,*
BETTY JO CHRISTIAN,
*Associate General Counsel,*
CHARLES H. WHITE, JR.,
*Attorney,*
*Interstate Commerce Commission.*

[8] Congressman Esch, the sponsor of the legislation which ultimately became Section 1(15) of the Act—the Esch Car Service Act, 40 Stat. 101—specifically referred to the practice of shippers using freight cars as warehouses as being a main cause of car shortage to be remedied by his legislation (55 Cong. Rec. 2020-2021): "Another cause of car shortage is the holding of cars on the part of the shippers themselves, using the car as a specie of warehouse, instead of promptly unloading it. I think that it is quite a universal evil throughout the United States, but it is due in some measure to the lack of warehouse and elevator facilities at the terminals."

# APPENDIX A

[Endorsed: Filed Oct. 18, 1973, Robert M. Christ, Clerk, By C. Mundorff, Deputy]

United States District Court for the District of Oregon

Civil No. 73-386

OREGON PACIFIC INDUSTRIES, INC.; ARTHUR A. POZZI CO.; TIMBERLANE LUMBER CO.; CHAPMAN LUMBER CO.; NORTH PACIFIC LUMBER CO.; AND AMERICAN INTERNATIONAL LUMBER CO.; PLAINTIFFS

*v.*

UNITED STATES OF AMERICA, DEFENDANT AND INTERSTATE COMMERCE COMMISSION, DEFENDANT-INTERVENOR

*Memorandum of decision*

Before: GOODWIN, Circuit Judge, and EAST and SKOPIL, District Judges[1]

STATEMENT OF THE CASE

On May 8, 1973, the intervenor Interstate Commerce Commission (Commission), basing its action on the provisions of 49 U.S.C. § 1(15), sua sponte, and without notice and hearing, issued its so-called Service

[1] Honorable Alfred T. Goodwin, United States Circuit Judge for the Ninth Circuit, Honorable William G. East, Senior United States District Judge for the District of Oregon, and Honorable Otto R. Skopil, Jr., United States District Judge for the District of Oregon, constituting a statutory three-judge district court by designation of Chief Judge Richard H. Chambers for the Ninth Circuit, dated May 25, 1973.

Order No. 1134 (Order). The Order has been from time to time continued and is now in effect.

The plaintiffs instituted these proceedings pursuant to 28 U.S.C. §§ 2321–2325 to annul and enjoin the enforcement of the Order contending, *inter alia,* that:

While the Order purports to deal with car service, it in truth and in fact deals with transportation charges over which the Commission has no authority under § 1(15) to change in the manner attempted by the Commission; and the Order issued without notice or hearing or good cause shown, suspends regularly and duly filed tariffs of the Commission "relating to joint and through [railroad shipping] rates for lumber and plywood in violation of 49 U.S.C. § 6(3) [sic]." [49 U.S.C. § 15(1)]

JURISDICTION

We note the jurisdiction of this three-judge district court under 28 U.S.C. §§ 2321–2325.

FACTS

We find from the agreed statement of facts and the affidavits filed herein these pertinent facts: Plaintiffs are Oregon corporations all engaged in the wholesale lumber business. In their business, they cause lumber and plywood purchased and sold by them to be transported from their sources of supply to their customers throughout the United States. The rates charged by railroads for transportation of lumber and plywood affect to a large extent the rate of economic activity in the Northwest and the impact of such rates is vital to the economy of the region and the plaintiffs.

Approximately 75 per cent of all the lumber and plywood produced in the Northwestern states is sold through the wholesale arm of the lumber industry.



For almost half a century the wholesalers have used a common practice of some form of a diversion or reconsignment of their railroad car shipments while in route from point of origin to or at the original destination under pre-fixed joint or through railroad shipment rates and charges established under duly filed tariffs as regulated by the Commission under its general powers and appropriate procedure under the Interstate Railroad Transportation Act, after notice and hearing.

In recent years the practice is generally known as wholesalers' sales-in-transit. The wholesaler will ship a given carload or carloads to a given "hold point" with the view that the car or cars will be ultimately diverted or reconsigned to a more distant point of final destination. The railroad joint or through shipping rate from the point of origin to the ultimate final destination is always substantially less than the combined or aggregate of short haul rates between intermediary points. For example, the through rate for a 7500 lb. minimum carload from Pacific Coast shipping points to New York, via the intermediate points of Marshalltown, Iowa, and Chicago, Illinois, is $1432.50, while the aggregate of the three local rates between points totals $2452.00.

The Order applies only to the transportation of lumber and plywood by railroads and provides that in the event carload shipments are held at a transit point more than 120 hours, exclusive of Saturdays, Sundays and holidays, and thereafter forwarded to another destination, or delivered to a newly designated consignee, such shipment will lose the benefit of any applicable through rate from the shipping point to the ultimate designation. Such shipment would be subject to the sum of the local rates which are as pointed out above usually substantially greater in amount.

The railroads of the United States have been struggling with the problem of boxcar shortages, particularly as they affect the lumber and plywood industries, for over fifty years, and the Commission has issued hundreds of Service Orders under 49 U.S.C. § 1(15) in an attempt to alleviate the problem caused by boxcar shortages. However, the Commission has never in the past issued an order pursuant to the claimed authority of 49 U.S.C. § 1(15), which imposed the severe sanctions upon shippers as contained in the Order, or which purported to affect the rights of shippers to make use of a joint or through rate in effect pursuant to a duly filed and authorized tariff. In comparison, the imposition of tariff regulated reasonable time based demurrage charges for cars held at a given point over stated times has been a traditional sanction upon shippers to keep the cars rolling.

ISSUE

Whatever authority the Commission may have to alleviate the problem of car shortages by prescribing shipping rates and charges through appropriate procedures, with notice and hearing, is not in issue. The basic and sole issue before the court is whether the Commission had Congressional authority under the "emergency" car service section, Title 49 U.S.C. § 1 (15), to promulgate and issue the so-called "car service" Order. We hold that it did not.

DISCUSSION

The authority of the Commission over "car service items" flows from 49 U.S.C. § 1(10), which provides in essential parts, "The term 'car service' * * * shall include the use, * * * movement * * *, and return of * * * cars * * * used in the transportation of property *by any carrier by railroad.* * * *" [Emphasis added.] So it follows that " 'car service' connotes the use to which the vehicles of transportation are put [by a carrier]; not the transportation service rendered by means of them." *Peoria & P.U. Ry. Co.* v. *United States,* 263 U.S. 528, 533 (1924).



Paragraph (14) of § 1 is the enabling section or procedural prerequisite for the issuance of the Commission's car service orders. The purpose of car service orders is best explained in *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 472, 743–744 (1972), through this observation of Mr. Justice Rehnquist:

> "The country's railroads long ago abandoned the custom of shifting freight between the cars of connecting roads, and adopted the practice of shipping the same loaded car over connecting lines to its ultimate destination. The freight cars of the Nation thus became in essence a single common pool, used by all roads. This practice necessarily required some arrangements for eventual return of a freight car to the lines of the road which owned it, and in 1902 the railroads through their trade association dealt with this and related problems in a code of car service rules with which the roads agreed among themselves to comply. The effect of the Commission's order now under review is to promulgate two of these rules as the Commission's own, with the result that sanctions attach to their violation *by the railroads.* [Emphasis added.]
>
> "Because of critical freight-car shortages experienced during World War I, Congress enacted the Esch Car Service Act of 1917, which empowered the Commission to establish reasonable rules and practices with respect to car service by railroads, 40 Stat. 101, 49 U.S.C. § 1(14)

(a). The pertinent language of that Act provides:

"'The Commission may [after hearing] * * * establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad subject to this chapter * * *.'" ["including the compensation to be paid * * * for the use of any * * * car * * * not owned by the carrier using it. * * *"]

So we emphasize that § 1(14) contemplates Commission rules and regulations, with respect to car service, applicable with sanctions, to uses of cars *by railroads* and not by shippers.

Section 1(15) gives the Commission four categories of emergency authority when it is of the opinion that shortages of equipment or other emergencies requiring immediate action exist, at once, with or without notice or hearing:

"(a) to suspend * * * rules, regulations, or practices *then existing* [emphasis added] with respect to car service * * *,

(b) to make * * * directions with respect to car service * * * during such emergency as * * * will promote * * * service * * * [and provide compensation *as between carriers*].

(c) to require * * * common use of terminals, * * * and

(d) to give directions * * * for preference or priority in transportation. * * *"

Manifestly the expressed authority to the Commission under either of categories (b), (c) or (d) does not support the Order under challenge. Nor does the expressed authority under category (a) give any validity to the Order. The Order does not purport to suspend any rule, regulation or practice then established in connection with car service. On the contrary



the Order condones the practice of sales-in-transit, which involves a form of boxcar warehousing for an indefinite time until a diversion or reconsignment occurs but requires shippers employing this practice to pay a higher ultimate shipping rate to the carriers.

Expressed authority to the Commission for fixing shipping rates and charges during a declared emergency under § 1(15) is utterly lacking and none can be rationally inferred or implied from the express language. It has been held that the "sole purpose" of categories (a) and (b) authority is "to make [railroad cars] available in emergencies to a carrier other than the owner. * * *" *Peoria & P.U. Ry. Co.* v. *United States,* supra, at 533, 534. Also, the section is no general grant of emergency power to prevent interruptions in traffic "and the detail in which the subjects of such power has been specified precludes its extensions to other subjects by implication." 263 U.S. at 535.

The intervenor urges the holding of *Turner, Dennis & Lowry Lbr. Co.* v. *Chicago, M. & St. Paul Ry. Co.,* 271 U.S. 259 at 262, as supportive of the Order. *Turner* did not involve and approve an order issued under § 1(15), but rather an order involving a "demurrage tariff duly filed." The decision is no authority for the Order challenged herein.

In summary, we point out that the sole purpose and effect of the Order is to deprive lumber and plywood shippers of the benefit of a long-standing railroad shipping practice, approved under prior lawful rate regulation procedures, and the further benefit of the pre-existing joint and through shipping rates provided therefor; and in turn to substitute for such joint and through rates a combination or aggregate of the local rates between intermediary points resulting in the im-

position of sanctions, which approach confiscatory amounts.

The Service Order label and the citation of authority therefor does not mask or legitimatize the illegal rate fixing Order developed through procedures lacking due process.

CONCLUSIONS OF LAW

We conclude that the Commission was without Congressional authority to issue the Order under the provisions of § 1(15) and acted arbitrarily and unlawfully in the formulation and issuance thereof and that the Order is void from its inception. Accordingly, the plaintiffs are entitled to an Order and Decree herein:

(a) setting aside, vacating and holding for naught the Order in its entirety as of its inception;

(b) restraining and enjoining the Commission and all persons acting on its behalf from the enforcement of the terms and sanctions imposed thereunder; and

(c) allowing plaintiffs' costs.

This Decision shall constitute the court's Findings of Fact and Conclusions of Law as provided in Rule 52(a), Federal Rules of Civil Procedure.

Dated this 18th day of October, 1973.

(S) ALFRED T. GOODWIN,
*United States Circuit Judge.*

(S) WILLIAM G. EAST,
*United States District Judge.*

(S) OTTO R. SKOPIL, JR.,
*United States District Judge.*

[Endorsed: Filed Oct. 18, 1973, Robert M. Christ, Clerk, By C. Mundorff, Deputy]

United States District Court for the District of Oregon

Civil No. 73-~~1~~3-86

OREGON PACIFIC INDUSTRIES, INC.; ARTHUR A. POZZI CO.; TIMBERLANE LUMBER CO.; CHAPMAN LUMBER CO.; NORTH PACIFIC LUMBER CO., AND AMERICAN INTERNATIONAL LUMBER CO., PLAINTIFFS

*v.*

UNITED STATES OF AMERICA, DEFENDANT AND INTERSTATE COMMERCE COMMISSION, DEFENDANT-INTERVENOR

*Decree*

Before: GOODWIN, Circuit Judge, and EAST and SKOPIL, District Judges

Based upon the Memorandum of Decision, constituting the court's Findings of Fact and Conclusions of Law, filed herein contemporaneously herewith,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

(1) The Service Order No. 1134 entered by the Interstate Commerce Commission, Division 3, at its session on the 3rd day of May, 1973, in Washington, D.C., under the title of Part 1033-Car Service, in its entirety, is set aside, vacated and held for naught as of its entry;

(2) The Interstate Commerce Commission and all persons acting for and on its name and behalf are

permanently restrained and enjoined from the enforcement of said Order in part or its entirety; and

(3) The plaintiffs have and recover costs herein.

Dated this 18 day of October, 1973.

(S) ALFRED T. GOODWIN,
*United States Circuit Judge.*

(S) WILLIAM G. EAST,
*United States District Judge.*

(S) OTTO R. SKOPIL, JR.,
*United States District Judge.*

## APPENDIX B

Service date: May 8, 1973.

Title 49—TRANSPORTATION

Chapter X—INTERSTATE COMMERCE COMMISSION

Subchapter A—GENERAL RULES AND REGULATIONS

Part 1033—*Car Service*

Service Order No. 1134

*Lumber and Plywood—Restrictions on Reconsigning*

At a Session of the Interstate Commerce Commission, Division 3, held in Washington, D.C., on the 3rd day of May 1973.

*It appearing,* That an acute shortage of boxcars and other freight cars suitable for transporting lumber and plywood exists throughout the country; that certain carriers are unable to furnish adequate supplies of these types of freight cars to shippers located on their lines; that these shortages of freight cars are impeding the movement of many commodities; that many freight cars are held by shippers for excessive periods awaiting loading, unloading, or disposition instructions; that carloads of lumber and plywood are being held for excessive periods awaiting instructions for diversion, reconsignment or other disposition orders; that such practices immobilize large numbers of freight cars needed by shippers for the transportation of other freight; and that the existing demurrage and detention rules, regulations, and practices of the railroads are ineffective to control such use of freight

cars. It is the opinion of the Commission that an emergency exists requiring immediate action to promote car service in the interest of the public and the commerce of the people. Accordingly, the Commission finds that notice and public procedure are impracticable and contrary to the public interest, and that good cause exists for making this order effective upon less than thirty days' notice.

It is ordered, That:

§ 1033.1134 *Lumber and Plywood—Restrictions on Reconsigning*

(a) Each common carrier by railroad subject to the Interstate Commerce Act shall observe, enforce, and obey the following rules, regulations, and practices with respect to its car service:

(1) *Application:* (i) The provisions of this order shall apply to intrastate, interstate, and foreign commerce. (ii) *Definition of lumber and plywood.* The term "lumber and plywood" as used in this order means lumber, veneer or forest products as listed in items 57580 to 58450 of Uniform Freight Classification No. 11, I.C.C. 7, or as listed in items 57580 to 58450 of Consolidated Freight Classification No. 23, I.C.C. No. 2, each issued by J. D. Sherson, supplements thereto, or re-issues thereof.

(2) ***Holding of cars for diversion, reconsignment, or disposition orders restricted:*** Carload shipments of lumber or plywood held in cars in excess of five days (120 hours), exclusive of Saturdays, Sundays, and holidays listed in Item 25 of General Car Demurrage Tariff 4–J, I.C.C. H–59, issued by B. B. Maurer, supplements thereto, or re-issues thereof, after the first seven a.m. (7:00 a.m.) after notice of arrival of the car at billed destination is sent or given and subsequently forwarded to another destination or delivered to a newly designated consignee upon instructions of the consignee, consignor, or owner, will be subject to the full local or joint (not proportional, reshipping, or transshipping) tariff rate from origin point to hold point in effect on date of shipment plus the full local or joint (not proportional, reshipping, or transshipping) tariff rate from the reforwarding point in effect on the date reforwarding instructions are given to carrier, plus all other applicable charges previously or subsequently accruing. (See exception.)



(3) ***Expection: Cars at hold points on May 15, 1973:*** A notice, giving car number and hold point, shall be sent on May 15, 1973, to each shipper, consignee, or other qualified owner of each car of lumber or plywood held awaiting instructions for diversion, reconsignment, or reforwarding on that date, stating that the car will be subject to the bases of charges provided in this order unless diversion, reconsignment, or reforwarding instructions are given to the carrier within five days (120 hours) exclusive of Saturdays, Sundays, and holidays of the effective date of this order. Such notice shall be used in lieu of the arrival notice described in part (2) herein, in computing time on cars at hold points on May 15, 1973.

(b) *Rules and regulations suspended.* The operation of all rules and regulations, including rates, rules, and free-time periods granted by authority of Part 1, Section 22 of the Interstate Commerce Act, insofar as they conflict with the provisions of this order, is hereby suspended.

(c) *Effective date.* This order shall become effective at 11:59 p.m., May 15, 1973.

(d) *Expiration date.* This order shall expire at 11:59 p.m. July 31, 1973, unless otherwise modified, changed, or suspended by order of this Commission.

(Secs. 1, 12, 15, and 17(2), 24 Stat. 379, 383, 384, as amended; 49 U.S.C. 1, 12, 15, and 17(2). Interprets or applies Secs. 1(10–17), 15(4), and 17(2), 40 Stat. 101, as amended, 54 Stat. 911; 49 U.S.C. 1(10–17), 15(4), and 17(2).)

*It is further ordered,* That a copy of this order and direction shall be served upon the Association of American Railroads, Car Service Division, as agent of the railroads subscribing to the car service and car hire agreement under the terms of that agreement, and upon the American Short Line Railroad Association; and that notice of this order be given to the general public by depositing a copy in the Office of the Secretary of the Commission at Washington, D.C., and by filing it with the Director, Office of the Federal Register.

By the Commission, Division 3.

[SEAL] ROBERT L. OSWALD,
*Secretary.*

## APPENDIX C

[Endorsed: Filed Dec. 17, 1973, Robert M. Christ, Clerk, By J. Shelton, Deputy]

In the United States District Court for the District of Oregon

Civil Action No. 73–386

OREGON PACIFIC INDUSTRIES, INC.; ARTHUR A. POZZI CO.; TIMBERLAND LUMBER CO.; CHAPMAN LUMBER CO.; NORTH PACIFIC LUMBER CO.; AND AMERICAN INTERNATIONAL LUMBER CO., PLAINTIFFS

*v.*

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

### *Notice of Appeal*

1. Notice is hereby given that the Interstate Commerce Commission, one of the defendants in the above-entitled action, hereby appeals to the Supreme Court of the United States from the opinion and order of this Court dated October 18, 1973. This appeal is taken pursuant to 28 U.S.C. § 1253.

2. The entire record in this action is hereby designated for certification by the Clerk of the District Court to the Clerk of the Supreme Court. The Clerk

of the District Court is requested to prepare and to transmit the entire record to the Clerk of the Supreme Court.

This 14th day of December, 1973.

Charles H. White, Jr.,
CHARLES H. WHITE, Jr.,
*Attorney,*
*Interstate Comerce Commission,*
*Washington, D.C. 20423.*

Fritz R. Kahn/Cw.
FRITZ R. KAHN,
*General Counsel.*

CERTIFICATE OF SERVICE

I hereby certify that on this, the 14th day of December, 1973, I served copies of the foregoing Notice of Appeal on counsel for all parties of record by first-class, air-mail, postage prepaid.

Charles H. White, Jr.
CHARLES H. WHITE, Jr.,
*Attorney.*

U.S. GOVERNMENT PRINTING OFFICE: 1974